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**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

MARGUERITE HIKEN and
THE MILITARY LAW TASK FORCE,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE
and UNITED STATES
CENTRAL COMMAND,

Defendants.

Case No. CV-06-2812 (MHP)

**PLAINTIFFS' SUPPLEMENTAL
CROSS-MOTION FOR SUMMARY
JUDGMENT AND OPPOSITION TO
DEFENDANTS' SUPPLEMENTAL
MOTION FOR SUMMARY
JUDGMENT**

Hearing Date: December 10, 2007
Hearing Time: 2:00 p.m.

INTRODUCTION

Plaintiffs initiated this action under the Freedom of Information Act ("FOIA") in response to the U.S. military's assaults on the city of Fallujah, Iraq from March through December 2004 and on the occupants of the car transporting unembedded journalist Giuliana Sgrena to the Baghdad Airport on March 4, 2005. On March 17, 2005, plaintiffs filed a FOIA request for the Rules of

1 Engagement (“ROE”) and other documents for the soldiers involved in the above incidents from
2 defendant Department of Defense.

3 The first round of summary judgment motions in this case involved five ROE-related
4 documents and an Army Regulation 15-6 Investigation Report¹ (“AR 15-6 Report”). The AR 15-6
5 Report at issue here pertains to the U.S. military’s March 4, 2005 attack on the car carrying Italian
6 journalist Giuliana Sgrena, resulting in the fatal shooting of Italian agent Nicola Calipari, non-fatal
7 shooting of Giuliana Sgrena and injury to Andrea Carpani, Ms. Sgrena’s driver and another official
8 of the government of Italy. Ghormley Declaration, Para. 13e; Supplemental Ghormley Declaration,
9 Para. 9.

10 This Supplemental Cross-Motion for Summary Judgment and Opposition to Defendants’
11 Supplemental Motion for Summary Judgment concerns eight pages of documents constituting three
12 letters and two documents translating and reporting on the letters. These five documents are part of
13 the AR 15-6 Report. Ghormley Declaration, para. 13e, Supplemental Ghormley Declaration, para.
14 9.

15 The Department of Defense forwarded these five documents to the Department of State for
16 a determination of releasability. Ghormley Declaration, para. 13c. The Department of State has
17 refused to release the documents, even in redacted format. Letter from Margaret P. Grafeld, Jan. 31,
18 2007, Exhibit A to Declaration of Margaret P. Grafeld (“Grafeld Decl.”). While it is not known
19 when the documents at issue in this supplemental motion were identified by defendants, it was not
20 until November 7, 2006 that the Department of Defense, U.S. Central Command referred the five
21 documents to the Department of State. *Id.*

22 The documents designated by defendants as U4 and U5 pertain to the personal effects of the
23 Italians killed and injured in the March 4, 2005 U.S. military attack on the car carrying Giugliana
24

25 ¹ Defendants originally identified five documents, including the AR 15-6 Report, in their
26 *Vaughn* Index submitted with their initial Motion for Summary Judgment on November 3, 2006.
27 However, after this court issued its Memorandum and Order Re: Cross Motions from Summary
28 Judgment on October 2, 2007, defendants provided plaintiffs and the Court a revised *Vaughn* Index
identifying eleven additional documents.

1 Sgrena. Grafeld Decl., paras. 21, 22; *Vaughn* Index to Defendants' Supplemental Motion for
 2 Summary Judgment ("*Vaughn* Index") 2. These documents appear outside the scope of plaintiffs'
 3 FOIA request and potentially impinge unnecessarily on the privacy of the occupants of the car.
 4 Accordingly, plaintiffs do not seek the release of documents U4 and U5.

5 Moreover, in light of the delays plaintiffs have endured in this case, Plaintiffs' Motion for
 6 Summary Judgment ("MSJ") 12-13; Plaintiffs' Motion to Strike Defendants' Supplemental Motion
 7 for Summary Judgment 2-3, plaintiffs request the Court order documents U1-U3 released or, to
 8 further judicial economy, at least provided *in camera* for inspection along with the other documents
 9 the Court has ordered defendants to make available for *in camera* review.

10 11 **WITHHELD DOCUMENTS**

12 According to defendants' *Vaughn* Index and Grafeld Declaration, the following documents
 13 have been withheld in full:

- 14 • **U1.** A two-page, March 12, 2005 letter, in Italian, from a senior Italian government official
 15 to the U.S. ambassador in Rome which conveys the Italian government's views regarding
 16 the "terms of reference" (i.e., the potential framework or modalities) for an investigation
 17 into the March 4, 2005 death of an Italian official near Baghdad, Iraq. This document was
 18 originally unclassified. Grafeld Decl., para. 18; *Vaughn* Index 1.
- 19 • **U2.** A one-page, March 12, 2005 letter, in English, from the U.S. Ambassador in Rome to a
 20 senior official in the Italian government relaying the official U.S. response to the Italian
 21 government with respect to the terms of reference for the investigation described in
 22 Document 1. This document was originally unclassified. Grafeld Decl., para. 19; *Vaughn*
 23 Index 1.
- 24 • **U3.** A three-page, March 14, 2005 telegram, assumedly in English, from the U.S. embassy
 25 in Rome to the Department of State and embassy in Baghdad reporting on the exchange of
 26 letters between the Italian government and the embassy in Rome, (Documents U1 and U2),
 27 and providing an informal translation of the Italian letter. This document was originally
 28 unclassified. Grafeld Decl., para. 20.

- **U4.** A one-page, April 1, 2005 letter, in Italian, from a senior Italian military official to the political level of his government which describes the personal effects of the Italians involved in the March 4, 2005 U.S. military attack. This document was originally unclassified. Grafeld Decl., para. 21; *Vaughn* Index, 2.
- **U5.** A one-page, April 1, 2005 translation into English of Document 4. This document was originally unclassified. Grafeld Decl., para. 22; *Vaughn* Index, 2.

Although none of Defendants' *Vaughn* indices identify the location of these five documents within the 964 pages of AR 15-6 materials, it appears they were located in Annex B to the AR 15-6 Report. Annex B lists the following documents on page BS 00005:

- **1B.** Letter from Italian delegation,
- **2B.** Letter from United States Ambassador to Italy, Mel Sembler, and
- **3B.** Email to BG Vangjel of the English translation of the Terms of Reference.

The following page, which is not Bates stamped, states that pages 00006-00011 were removed for referral to the State Department.

While it is possible that some of the documents listed in Annex B correspond with those listed in the *Vaughn* Index, it is far from clear that they are the same documents. Furthermore, the *Vaughn* index lists five documents while the Annex only lists three. The government has provided no information to clarify this matter.

ARGUMENT

I. THE COURT SHOULD NOT ABDICATE ITS RESPONSIBILITY TO SCRUTINIZE DEFENDANTS' CLASSIFICATION DECISIONS.

Defendants devote a substantial portion of their supplemental motion to their assertion that the Court should accord substantial weight to agency affidavits and not "second-guess" agency opinions in a FOIA case involving documents that are said to implicate national security.²

² In their earlier pleadings, Defendants mis-cite *EPA v. Mink*, 410 U.S. 73 (1973). Not only do they represent it as a 1993 case, e.g. Reply 10, Surreply 11-12, but they also support the proposition that courts should not second-guess Executive classification decisions by citing to a

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Defendants' Supplemental Motion for Summary Judgment 7-9; *see also* Defendants' MSJ 8; Defendants' Reply in Support of Their Motion for Summary Judgment and Opposition to Plaintiffs' Cross-Motion for Summary Judgment ("Reply") 9-10; Defendants' Surreply in Support of Their Motion for Summary Judgment ("Surreply") 10-12. Nevertheless, court scrutiny remains very much a part of FOIA procedure, because

[w]hile an agency's declarations setting forth the reasons that information falls within this exemption are entitled to substantial weight, they must nevertheless afford the requester an ample opportunity to contest, and the court to review, the soundness of the withholding. . . . *Goldberg v. Dep't of State*, 818 F.2d 71, 76-77 (D.C.Cir.1987) (noting that *Exemption 1* does not relieve the courts of their "independent responsibility" to review the agency's decision).

American Civil Liberties Union v. FBI, 429 F.Supp.2d 179, 187 (D.D.C. 2006) (emphasis added).

As Plaintiffs pointed out in their earlier pleadings, the Court's independent responsibility to review agency classification decision-making has never been so important as in the present era of rampant overclassification of government documents and a deliberate policy by the Executive to keep documents secret. *See* Plaintiffs' Motion for Summary Judgment 18-19. Moreover, deference "is not equivalent to acquiescence," *American Civil Liberties Union v. FBI*, 429 F.Supp.2d at 187 (parenthesis, internal quotation marks omitted). Accordingly, the Court should scrutinize defendants' assertions that the documents at issue here should be kept secret, and in so doing should order their disclosure or at least their production for *in camera* review.

II. DEFENDANTS HAVE FAILED TO MEET THEIR BURDEN TO WITHHOLD DOCUMENTS PURSUANT TO EXEMPTION 1.

Under certain circumstances, the government can withhold classified information under Exemption 1 of the FOIA. 5 U.S.C. § 552(b)(1). Information that concerns foreign relations, foreign activities of the United States or foreign government information may be classified. Exec.

(...Continued)

portion of *Mink* that was superseded by a subsequent revision to the statute. E.g. *Halpern v. FBI*, 818 F.3d 279, 291 (1999).

1 Order No. 12958, Classified National Security Information³ (“E.O. 12958”) § 1.4(b) & (d).

2 “Foreign government information,” according to the relevant provisions of E.O. 12958, means:

3 (1) information provided to the United States Government by a foreign government
4 or governments, an international organization of governments, or any element
5 thereof, with the expectation that the information, the source of the information, or
6 both, are to be held in confidence; [¶] (2) information produced by the United States
7 Government pursuant to or as a result of a joint arrangement with a foreign
8 government or governments, or an international organization of governments, or any
9 element thereof, requiring that the information, the arrangement, or both, are to be
10 held in confidence[.]

11 E.O. 12958 § 6.1(r). However, such information cannot be classified unless its unauthorized
12 disclosure “reasonably could be expected to result in damage to the national security . . .” E.O.
13 12958 § 1.1(a)(4). “Damage to the national security,” in turn, means “harm to the national defense
14 or foreign relations of the United States from the unauthorized disclosure of information, taking
15 into consideration such aspects of the information as the sensitivity, value, utility, and provenance
16 of that information.” E.O. 12958 § 6.1(j).

17 On summary judgment, “the strong presumption in favor of disclosure places the burden on
18 the agency to justify the withholding of any requested documents” whether the agency seeks to
19 withhold an entire document or merely redact information from a document. 5 U.S.C. §
20 552(a)(4)(B); *U.S. Dept. of State v. Ray*, 502 U.S. 164, 173 (1991); *Bay Area Lawyers Alliance for*
21 *Nuclear Arms Control v. Dep’t of State*, 818 F.Supp. 1291, 1295 (N.D. Cal. 1992).

22 Defendants here cannot meet this burden because release of documents U1-U3 would not
23 result in damage to the national security – i.e. harm foreign relations of the United States. E.O.
24 12958 § 6.1(j). Although defendants cite the need to keep diplomatic correspondence confidential
25 to protect their relationship with the Italian government, they have introduced scant evidence that
26 such release would actually harm this relationship.

27 In fact, the incident itself caused considerable public outrage and damage to diplomatic
28 relations between the United States and Italy.⁴ As defendants themselves admit, the killing of a

³ E.O. 12958 was amended by Executive Order 13292. *See* 68 Fed.Reg. 15315; *American Civil Liberties Union v. Dep’t of Defense*, 389 F.Supp.2d 547, 558 (S.D.N.Y. 2005).

high-level Italian intelligence officer who successfully negotiated the release of kidnapped Italians in Iraq “remain[s] a sensitive topic in Italy and in relations between Italy and the United States.” Grafeld Decl., para. 18. While the shooting remains a sensitive *topic*, defendants have not provided evidence that the withheld *information* is sensitive within the meaning of Exec. Order 12958 § 6.1(j). Moreover, the value and utility of this information are high, because it could enhance the public’s understanding of an incident that has generated intense debate. *Id.*

Regarding documents U1-U3, defendants provide not a single reason the Italian government might object to the disclosure of the information in these letters, such as the Italian’s views regarding “terms of reference” of the investigation or the United States’s official response to the Italians regarding the “terms of reference.” Moreover, defendants have documented no attempt to seek the Italians’ consent to release of these documents.

Basing nondisclosure on the protection of diplomatic relations appears to be an attempt by defendants to use the Italian government as a scapegoat to justify their continued attempts at secrecy and overclassification⁵ to avoid further embarrassment over the incident.⁶ However, classifying documents to prevent embarrassment is expressly prohibited by Executive Order 12958, which defendants seek to use to justify non-disclosure. E.O. 12958 § 1.7 (a) (Materials are “in no case” to be classified to “conceal violations of law,” “prevent embarrassment to a person, organization or agency,” or “prevent or delay the release of information that does not require protection in the interest of national security.”)

Furthermore, it is highly likely that the Italians would not oppose the release of information

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⁴ *U.S. Bars Italians from Examining Victim’s Car*, Army Times.com, March 23, 2005, www.armytimes.com/print.php?f=1-292925-740304.php; Grafeld Decl., para. 18.

⁵ At the March 26, 2007 hearing on cross-motions for summary judgment, the Court stated, “I don’t understand why there is this great effort at secrecy and non-disclosure. By secrecy, I mean classification for information that is commonly known, because it suggests, then that there is overclassification.” Judge Patel, Transcript of Proceedings, March 26, 2007, 51:7-10.

⁶ “[Italian Intelligence Officer Nicola] Calipari’s killing outraged Italians and prompted [former] Premier Silvio Berlusconi to demand that Washington provide an explanation.” *U.S. Bars Italians from Examining Victim’s Car*, Army Times.com, March 23, 2005, www.armytimes.com/print.php?f=1-292925-740304.php.

1 included in documents U1-U3, which would shed light on how the U.S. and Italian governments
 2 approached the investigation into the shooting, for the following reasons: First, the U.S. and Italy
 3 were unable to produce a joint report concerning the Sgrena shooting.⁷ Instead, each country
 4 released its own report, coming to differing conclusions on several key issues, including the speed
 5 of the car, the propriety of the soldiers' actions, and whether or not the U.S. knew that Sgrena
 6 would be traveling on the road to the Baghdad Airport on the night of the shooting.⁸ Second, the
 7 U.S. military blocked Italian investigators' attempts to examine Sgrena's bullet-ridden car
 8 immediately following the shooting.⁹ That these two governments produced such divergent reports
 9 highlights the need for the release of information that could help further public understanding of
 10 the shooting – such as documents U1-U3.

11 CONCLUSION

12
 13 For the foregoing reasons, the Court should order documents U1-U3 disclosed, or at
 14 minimum produced for *in camera* review.

15
 16 DATED: November 12, 2007

Respectfully submitted,

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 18
 19 BY: /s/ Colleen Flynn
 20 COLLEEN FLYNN
 21 CHRIS FORD
 22 W. GORDON KAUPP
 23 Attorneys for Plaintiffs
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26 ⁷ *Dueling Views of the Sgrena Shooting*, Christian Science Monitor, May 5, 2005,
 27 www.csmonitor.com/2005/0505/p07s01-woiq.html.

28 ⁸ *Id.*

⁹ *Id.*; Letter, March 19, 2005, Annex M to AR 15-6 Report, BS 000900.